**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA, *et al.*<br><br>Plaintiffs,<br><br>vs.<br><br>TYSON FOODS, INC., *et al.*<br><br>Defendants. | Case No. 05CV0329-GKF-PJC |

**DEFENDANTS' JOINT MOTION *IN LIMINE* TO PROHIBIT ANY SUGGESTION BY PLAINTIFFS THAT ANY TRADE ORGANIZATION SPEAKS FOR ANY DEFENDANT**

Plaintiffs' experts and lay witnesses, and Plaintiffs through their pleadings and filings, have indicated their intention to suggest that certain trade organizations have spoken or do speak for one, some, or all of Defendants. Accordingly, Defendants respectfully file this Joint Motion *in limine* to exclude references to or suggestions that trade organizations have spoken or are speaking for any Defendant.

**SUMMARY FACTS**

As set out in *Defendants' Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6 and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability under Counts 4, 6 and 10*, Dkt. No. 2069, at 1-4 (May 18, 2009) ("Causation Motion"), Plaintiffs have made clear their intention to try this case on an industry-wide basis. *See e.g. Plaintiffs' Motion for Partial Summary Judgment*, Dkt. No. 2062, at 24 (¶48), 29 (¶c), (May 18, 2009) (alleging erroneously that some of Plaintiffs' claims have been "confirmed by a multitude of sources, including…Defendants, Defendants' retained experts and Defendants' trade associations.")

In this regard, Plaintiffs' evidence of causation and claims of injury turn on undifferentiated allegations of poultry litter application and injuries to waters in the IRW (and elsewhere), with no specific evidence tying any of these instances to any particular Defendant. *Id.* Plaintiffs' contend, *inter alia*, that statements made by trade organizations – including The Poultry Federation and the U.S. Poultry & Egg Association – are statements adopted and authorized by and made on behalf of one, some, or all of Defendants, whether or not each Defendant was a member of the organization, adopted and authorized the statement, or was even aware of the statement. *See e.g.* Deposition of Benny McClure, August 15, 2007 at 101:13 – 102:1 (stating that Defendant George's, Inc., had not been a member of The Poultry Federation "for years").

Plaintiffs have not secured a defendant class. Therefore, each individual Defendant has a right to insist that any liability be proven by evidence specifically demonstrating each particular Defendant's responsibility. *See, e.g., Doe v. Cassel*, 403 F.3d 986, 988 (8th Cir. 2005) (motion to dismiss properly granted as to an amended complaint for alleging collective misconduct and not differentiating acts and omissions between individual defendants). As to numerous points to be proved at trial, Plaintiffs must present evidence specific to each individual Defendant. Each Defendant is a separate corporate entity with different facilities, operations, and activities. Each Defendant contracts with different independent contract producers ("contract growers"), pursuant to different agreements and different business practices. Likewise, each Defendant maintains a separate status vis-à-vis any particular trade organization. Plaintiffs' proof based upon trade organization activities does not apply to each company equally – not all Defendants were even members of any particular trade organization at the time of the organization's subject activity.

*See e.g.* Deposition of Benny McClure, August 15, 2007 at 101:13 – 102:1 (stating that Defendant George's, Inc., had not been a member of The Poultry Federation "for years").

For these and other reasons, Plaintiffs' generalized attribution of evidence, including evidence that trade organizations have spoken for or do speak for all Defendants, is insufficient to meet Plaintiffs' burden to prove elements such as causation and injury against each Defendant individually. *See* Causation Mot. at 16-21 (setting out legal basis requiring Plaintiffs to show individualized proof as to each Defendant); s*ee also, e.g., Schneiderman v. United States*, 320 U.S. 118, 147, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943) (Court's noting that "The Government frankly concedes that 'it is normally true *** that it is unsound to impute to an organization the views expressed in the writings of all its members, or to *impute such writings to each member* ***.'") (emphasis added).

**DISCUSSION**

Because Plaintiffs bear the burden of proving their case as to each individual Defendant, it would be improper of them suggest that any statements of a trade organization are attributable to or binding upon all or any of Defendants. Unless it can be established that any statement of a non-party trade organization satisfies an exception to the rule prohibiting hearsay testimony, *see e.g.* FRE 802, and further was made with the authorization of and specifically on behalf of each of Defendants, the statements of a trade organization would be irrelevant under Rule 402 and, alternatively, would be unfairly prejudicial, confusing, and misleading under Rule 403.

**I. Suggestions that Any Trade Organization Speaks for Any Defendant Are Irrelevant Under Federal Rule of Evidence 402**

Rule 402 establishes the baseline rule that relevant evidence is generally admissible, while irrelevant evidence is always inadmissible. Fed. R. Evid. 402 ("Evidence which is not relevant is inadmissible."). To the extent that previously admitted evidence has not already

established that a particular statement of a trade organization may be imputed to each Defendant, then generalized references to each and every Defendant collectively on that point necessarily invites the trier-of-fact to speculate as to the applicability of the statement to, and potentially the liability of, those Defendants not implicated by specific proof.

By way of illustration, a statement by letter from an employee of the trade organization The Poultry Federation – even if it meets an exception to the hearsay rule – surely is irrelevant if offered for purposes of establishing that the contents of the statement are authorized by, imputed to, and binding upon all of Defendants, particularly considering that not all of Defendants were even members of The Poultry Federation at the time the statement was made. *See e.g. Plaintiffs' Motion for Partial Summary Judgment*, Dkt. No. 2062, at 24 (¶48), 29 (¶c), (May 18, 2009) (alleging erroneously that some of Plaintiffs' claims have been "confirmed by a multitude of sources, including…Defendants, Defendants' retained experts and Defendants' trade associations."); *but cf.* Deposition of Benny McClure, August 15, 2007 at 101:13 – 102:1 (stating that Defendant George's, Inc., had not been a member of The Poultry Federation "for years").

## II. Suggestions that Any Trade Organization Speaks for Any Defendant Would be Unfairly Prejudicial, Would Confuse the Evidence, and Would Mislead the Jury, and Thus Should be Excluded Under Federal Rule of Evidence 403

As set forth in the Causation Motion, Plaintiffs must prove causation against each individual Defendant. *See, e.g., McKellips v. St. Francis Hospital, Inc.*, 741 P.2d 467, 470 (Okla. 1987); *Woolard v. JLG Indus.*, 210 F.3d 1158, 1172 (10th Cir. 2000); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 114 (Mo. 2007).

> In all tort cases, the plaintiff must prove that *each defendant's conduct was an actual cause*, also known as cause-in-fact, of the plaintiff's injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.

*Id.*, at 113-14 (emphasis added); *see also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-78 (10th Cir. 2009); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma has not and would not adopt alternative, collective or non-identification theories of liability); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same). Meeting this burden requires proof against each Defendant individually, not all Defendants collectively, and certainly not all Defendants through the activities of a non-party trade organization.

The finder-of-fact will have to track carefully what proof, if any, has been submitted against each Defendant on each relevant point. Permitting Plaintiffs to present evidence in summary and collective fashion, particularly through proof of statements made by a non-party trade organization which may or may not be speaking with the authority or knowledge of all Defendants, would be improper. Plaintiffs must first establish, for any statement made by a trade organization, that each Defendant for whom the Plaintiffs seek attribution adopted the truth of and authorized the statement, *see e.g.* a Fed. R. Evid. 801(d)(2), before suggesting that the organization was "speaking for" all Defendants in making the statement.

Courts facing similar circumstances have properly prevented a party from making generalized references aggregating similarly situated groups of defendants. *See, e.g., United States v. Edwards*, 159 F.3d 1117, 1127 (8th Cir. 1998) (holding that the district court was "appropriately cautious" in allowing clarification of "the number of people referred to by a plural pronoun, to negate any inference it might refer to all defendants."). In *Smith v. Arthur Andersen*, 2005 WL 5976558, at *1 (D. Ariz. 2005), the district court granted a similar motion to prevent collective references to a group of insurance underwriter defendants. *See* Motion at *Smith v.*

*Arthur Andersen*, 2005 WL 2516854 (D. Ariz. Aug. 5, 2005) (motion to preclude reference to defendants as a group granted).

Any attempt by Plaintiffs to suggest a non-party trade organization, such as The Poultry Federation or U.S. Poultry & Egg Association, necessarily speaks for all Defendants – and effectively to circumvent Plaintiffs' burden of proving each Defendant's conduct proximately caused any claimed damages – would be improper and should be prohibited. Such a suggestion would be no more reliable than contending that a state bar association always speaks for all lawyers, whether or not the lawyers were all members of the association or had knowledge of the statement. The suggestion by Plaintiffs is not relevant and would constitute unfairly prejudicial, misleading, and confusing evidence that would substantially outweigh any slight probative value the suggestion might have.

**CONCLUSION**

For these reasons, any suggestion that any trade organization has spoken for or does speak for all Defendants would unfairly characterize each Defendant with evidence attributable to only one, some, or even none of Defendants, thereby confusing the evidence, misleading the jury, and prejudicing all Defendants. Rather than face constant objections at trial, the better course is to require Plaintiffs *ex ante* to make no suggestion that any trade organization speaks for Defendants.

Respectfully submitted,

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